Book Reviews

Seeking a New Partnership: Asymmetrical and Confederal Options / À la recherche d'un nouveau contrat politique pour le Canada: options asymétriques et options confédérales.

Edited by F. LESLIE SEIDLE.

Canada: Reclaiming the Common Ground.

By DONALD G. LENIHAN, GORDON ROBERTSON AND ROGER TASSÉ.

Reviewed by John P. McEvoy

Both books under review are products of a governance project undertaken by the Institute for Research on Public Policy on the assumption that status quo federalism is the only alternative likely to be presented to Québec voters during the sovereignty referendum campaign. The validity of this assumption remains to be proven but is highly probable. After failure of the Charlottetown Accord, Canadians and their governments resolved to take a formal collective “breather” from constitutional renewal. The present federal government was elected, in part, on this promise.

The first book, Seeking a New Partnership: Asymmetrical and Confederal Options / À la recherche d'un nouveau contrat politique pour le Canada: options asymétriques et options confédérales reflects the proceedings of a June 1994 conference. The book, mirroring the conference sessions, divides into three main parts examining (i) asymmetrical and confederal options, assuming a “Yes” vote in the sovereignty referendum; (ii) flexibility within the status quo option; and (iii) the lessons of a comparative perspective, focussing on the Czechoslovak and Belgian experiences — lessons which will not be considered in this review. The eleven main speakers, with one exception, were political scientists. The three main parts are complemented by an introduction by the editor, F. Leslie Seidle, research director of the governance project; opening

* John P. McEvoy, of the Faculty of Law, University of New Brunswick, Fredericton, New Brunswick.
remarks on constitutional dynamics and game theory by Monique Jérôme-Forget, IRRP President; a panel introduction by the editor, F. Leslie Seidle, research director of the governance project; opening remarks on constitutional dynamics and game theory by Monique Jérôme-Forget, IRRP President; a panel discussion on the conference themes; and a concluding comment by Seidle as conference rapporteur.

Jérôme-Forget's introductory remarks on game theory and constitutional negotiations, reminiscent of former Prime Minister Brian Mulroney's infamous "roll the dice" comments during the Meech Lake process, are appropriately reproduced in both English and French versions. The lessons she derives from game theory are clear. Intergovernmental negotiations must not persist as high-stakes games and federal-provincial relations are not a zero-sum game. Jérôme-Forget concludes "that the price of nationhood in Canada will always be some degree of disunity" (at 24).

Peter M. Leslie of Queens University presents a valuable discussion of asymmetry based, as are most of the presentations, on analysis of the European Union. He identifies the general principle that asymmetry is not permitted in the E.U. if it would confer comparative economic advantage or privilege over other Union members. There are two exceptions to this principle. First, asymmetry is accepted in relation to narrowly defined functions or purposes, for example, employment or environmental standards, language, culture, family law, and human rights. The practical problem is that such exceptions open the possibility of "social dumping" as these non-economic functions are exploited by a member state for comparative economic advantage. The willingness of the Union to accept such limited asymmetry is the key element in this analysis and such willingness, in practice, has been justified by a perception that such asymmetry is either temporary or the result of bargaining strength. Second, Leslie finds asymmetry in the example of the strict conditions for membership in the European Monetary Union such that not all states will be permitted membership. The purpose of this asymmetry is to protect fiscally stronger states from the negative impact of weaker states.

Leslie then turns to the Québec-Canada context. The Parti Québécois concept of sovereignty is coupled with a continuing economic association with Canada. Is the economic relationship to be a NAFTA-type free trade zone, in which domestic trade laws apply subject to a dispute settlement mechanism, or a true economic union with the political structures to manage the economic union? If the latter, how will the interests of Canada and Québec be protected? What voice will each permit the other to have in joint institutions? Will Canada accept Québec as an associate member of the Canadian federation? Will Québec accept a quid pro quo asymmetry in which Québec loses a voice in central institutions in relation to repatriated legislative powers? These considerations lead Leslie to conclude that the most likely, though undesirable, scenario is for a NAFTA-type of economic association in which the predominance of the United States will leave both Canada and Québec as politically neutered appendages of the United States.
Philip Resnick, of the University of British Columbia, offers the view that Canada is essentially a multi-national federation comprised of English Canada, Québec and the Aboriginal Peoples. His analysis focuses on the institutional arrangements for such a federation. The problem with this view, as aptly acknowledged by commentator Thomas Flanagan of the University of Calgary, is the absence of an English Canadian "national" identity in place of the existing civic identities of English-speaking Canadians. In terms of asymmetry, Leslie sees advantages in a limited *quid pro quo* asymmetry for Québec. Its legislative powers would be increased yet the federal framework would be retained. However, a stronger asymmetry in favour of Québec would not be acceptable for essentially the reasons identified by Leslie. Though recognizing problems with the multinational confederal model, Resnick favours that option model over the break up of Canada.

Leslie and Resnick disagree over the status quo. Leslie regards the status quo option as dynamic rather than static. He sees two contrary forces at play. Federal fiscal pressures, promoting a decentralization of spending responsibilities to the provinces, are opposed by centralizing influences from the NAFTA as the federal government exercises its legislative power to protect Canada's economic interests. For his part, Resnick's concept of Canada as a multinational federation necessarily leads him to regard the status quo as a non-option.

Flexibility within the existing constitutional order is the theme of the second part of the book containing the presentations of David Milne, of the University of Prince Edward Island, and Stéphane Dion, of the Université de Montréal. Both Milne and Dion recognize the existing asymmetry within the Canadian constitution. In general, however, such asymmetry does not encompass distinct legislative jurisdiction but is directed to minor matters such as financial subsidies or similar provisions contained in the respective terms of union; the highly asymmetrical provision of section 94 of the Constitution Act, 1867 regarding the uniformity of laws in the common law provinces has never been operational. Both presenters agree that flexibility is found in the present system of federal-provincial administrative agreements in such areas as immigration and taxation. Milne develops the theme of accommodation by political elites in Canadian constitutional development but questions whether the political will exists to use the tool of asymmetry. For him, asymmetry through administrative agreements holds little symbolic value compared to the explicit symbolism of separation.

In response, Dion argues that it is time to promote the efficiency advantages of federalism. This point is very significant given the political correctness of sovereignists in Québec. Dion argues that the fundamental value of public service-at-the-least-cost should be reasserted and those who wish to alter the present constitutional arrangements should bear the burden of proof in support of either asymmetrical federalism or separation. Dion in fact rejects asymmetrical federalism as a viable option. For him, federalists in Québec favour asymmetry to avoid separation; separatists view asymmetry as a step towards separation.
Asymmetry, as a concept, is not new. Constitutional lawyers and political scientists have recognized the asymmetrical features of the Constitution Act, 1867 and have considered further use of that tool in response to the aspirations of Québec and other provinces. The dynamism of federalism is also not new. Every constitutional lawyer is familiar with the historical ebb and flow of such legislative jurisdiction as POGG and Trade and Commerce and the more contemporary development of executive federalism. The real question for all presenters, commentators and readers was succinctly stated by Patrick Watson, session chair, as “how much asymmetry can we manage in Canada?” (at 104).

Some commentators considered that flexibility through administrative agreements made status quo federalism a viable option. Some felt that formal constitutional protection for administrative agreements is essential as, for example, the five year protective period under the Charlottetown Accord. Others favoured the confederal model. And, some considered that there were no viable options to separation. Constitutional Law is, after all, politics at its most refined. As expected, no single conference can answer such an important political question as “how much asymmetry”. Analysis remained in the realm of generalities and no presenter analyzed specific legislative powers as appropriate subjects for asymmetry. Such analysis would benefit from consideration of the provincial inability test cases such as A.G. of Canada v. Canadian National Transportation Ltd.¹ and R. v. Crown Zellerbach Canada Ltd.²

A sub-theme to the asymmetry discussions of a number of presenters in Seeking a New Partnership is the interaction of federalism and liberal democracy. This theme is the focus of Canada: Reclaiming the Common Ground by Donald Lenihan, Research Associate at the Canadian Centre for Philosophy and Public Policy, University of Ottawa; Gordon Robertson, former Clerk of the Privy Council and federal constitutional advisor; and Roger Tassé, former federal Deputy Minister of Justice and constitutional specialist. Canada: Reclaiming the Common Ground is a think-piece in which the authors formulate what they term a “meta-vision” for Canada from the competing, and at times contradictory, concepts and interests that motivate Canadians. “Meta-vision” is defined as “a set of over-arching principles, values or commitments in terms of which the legitimacy of competing visions, and of the decision-making process itself, can be debated and evaluated” (at 6-7). What the authors seek is a definition of the distinctive purposes of the Canadian state and a strategy for the future.

Federalism and liberal democracy are presented in conflict within the Canadian state. While federalism implies diversity (what the authors term “federal pluralism” and identify with regional, cultural and linguistic communities), liberal democracy is an egalitarian concept in opposition to diversity. The fundamental nature of equality and individual rights, epitomized by the Canadian Charter of Rights and Freedoms, when coupled with common citizenship is criticized as favouring liberalism over federal diversity. What is

necessary, conclude the authors, is to contextualize individual rights within the framework of federal pluralism and their “meta-vision”. In other words, a new balance must be struck between the diversity of federalism and a liberal approach to basic human rights, with greater emphasis on federalism.

This analysis leads the authors to consider the roles of liberalism and federalism as defining elements of the Canadian state. Recognizing nothing distinctly Canadian about liberal democracy, equality and freedom, the authors use historical context to frame the nature of a distinctly Canadian federalism and conclude that federalism in Canada is defined by respect for three types of communities: regional communities, the two linguistic communities and the Aboriginal communities. The authors recognize that this is a form of the legally discredited but politically expedient pact or compact theory. It is this distinct federalism which must then inform the application of liberalism to individual and collective rights.

Applied to the Aboriginal community, and assuming an aboriginal right to self-government, the authors find no real conflict between that right and liberal democracy informed by their meta-vision. The elements of respect for the cultural and linguistic needs of the Aboriginal communities, through sensitive sections 1 and 25 Charter analysis, means that Aboriginal self-government can and must respect individual freedoms and equality rights and be based on the “social contract” support of the aboriginal peoples. Asymmetrical federalism is also a necessary element of Aboriginal self-government as communities assume different levels of responsibility through negotiated self-government agreements.

Applied to Québec, construction of the “meta-vision” requires both a redefinition of Québec “nationalism” and a constrained definition of “culture” for purposes of legislative jurisdiction. Accepting the internal/external evolution of Québec nationalism as involving both the preservation of the French language and culture (“la survivance”) and a territorial notion of Québec as the home of French Canadians, the authors argue that the immigration factor must mean that Québec nationalism cannot be ethnic in nature but rather built on the shared vision of a thriving francophone society in North America. A constrained definition of “culture” would, in turn, separate language from comparative economic functions which are more properly understood as claims of the regional community within the meta-vision. As an example, the authors point to the statutory use of Caisse de dépôt and the Québec Pension Plan to invest in and subsidize industry as more properly characterized as a regional than a linguistic community claim. This analysis is similar to that of Leslie’s, above, regarding his first model of asymmetry in the European Union. Thus redefined, Québec nationalism and cultural interests share a common ground with Canadian federalism. Rather than asymmetrical solutions, which they regard as unworkable, the authors favour greater flexibility in the status quo through sensitive use of Charter section 1 justification analysis, administrative agreements, and consensus on the proper limits of federal legislative initiatives in areas of provincial jurisdiction, particularly through exercise of the federal spending power. Like Dion, above, efficiency arguments are critical in defining proper federal and
provincial roles. In terms of constitutional amendments, the authors favour both recognition of Québec as a distinct society and flexibility enhancement through the tools of concurrency and inter-governmental delegation of legislative jurisdiction.

The message of the authors is clear. There is a middle ground. Canadian federalism is a dynamic system or process with the capacity for flexibility and accommodation of the regional, linguistic and aboriginal communities. The exclusivity approach to legislative jurisdiction, a holdover of the early watertight compartments approach, denies the interdependence of provincial and federal powers and governments. Having focused on the immediate issues of Québec sovereignty and self-government for aboriginal peoples, the authors can easily be faulted for having generally underplayed the regional dimension of their meta-vision as it pertains to other provinces and regions of Canada. That dimension too is dynamic and critical.

Both books are valuable contributions to constitutional debate in Canada. The essence of the flexibility that they promote and the inter-dependence of federal and provincial jurisdictions are accepted by all constitutional players in Canada. The assignment of legislative jurisdiction under the Constitution Act, 1867 is a formal assignment of exclusive jurisdiction not an assignment which precludes cooperation and denies interdependency. The efforts of the Uniform Law Conference and the Internal Trade Agreement, due to come into force in 1995, are strong symbols of that cooperation and inter-dependence. The message of pluralist/multi-national federalism, respecting the three defining communities, is an important message. Whether it will be heard and whether it will make any difference, only time will tell.

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Copyright Law in China.

By ZHENG CHENGSI and MICHAEL PENDLETON.

Reviewed by C. Paul Spurgeon*

On October 15, 1992, the People's Republic of China became a signatory to the Berne Convention For the Protection of Literary and Artistic Works. This event will undoubtedly focus the world's attention on this nation both as a market for the consumption and a source of copyright works. Copyright Law in China is a well organized book and the first text of its kind which expertly details the history, development and practical application of Chinese copyright law within the "Legal Culture" of a heritage that began over four thousand years ago — the oldest continuous civilisation in human history.

*C. Paul Spurgeon of the Ontario Bar, Toronto, Ontario.
The book clearly chronicles the Chinese treatment of those notions of intellectual property that compare with western notions of copyright law from its inception as a concept in early times, prior to 1949, from 1949 to 1979 and through to the passage of the *Copyright Law of the People's Republic of China* September 7, 1990.

While both East and West intellectual property scholars agree that copyright concepts began with the invention of printing, to the Western scholar, the invention of the printing press in Europe by Gutenberg marked the beginning of the world's development of copyright law. The authors', on the other hand, postulate that if the emergence of copyright is necessarily linked with printing, since printing was invented in China centuries before Europe, then one would expect that copyright first emerged in China. It is suggested that it may have been possible that Gutenberg's invention came about through information on developments in China. Whatever the origins may be, it is clear from research that copyright law concepts such as "reproduction", a "rights reserved notice" or paiji and other copyright law concepts developed in China in accordance with its own traditions and "Legal Culture".

Chinese copyright law in the twentieth century is of particular interest both prior to and after the establishment of the People's Republic of China. Since 1949, the general development of modern Chinese law is interesting when one considers that during "The Great Leap Forward", advocating law or even claiming to be a lawyer "was tantamount to counter-revolution".

*Copyright Law in China* explains the country's copyright law in the context of the Chinese legal system which, in the authors' words, is a "complex mix of ideology, ancient concepts and practices and traditional values" and will provide the reader with an excellent understanding of the principles and legal rules that flow from the statutory provisions of the Chinese Copyright law.

Of particular interest are descriptions and comments on four important legal cases that have influenced Chinese copyright law prior to the passage of the new law. The discussion of these cases gives the western reader an understanding of the differences in Chinese thought on the issues that arise in disputes over intellectual property and also provides a background for the reader to better understand the development of China's treatment of Copyright law concepts.

The provisions of the new law are explained in a manner that permits the reader, who, for the most part will be familiar with Anglo-American and European concepts of copyright and *droit d'auteur*, to better understand the application of the law to both Chinese and foreign nationals.

In addition to the history and background and development of Chinese copyright law, the book includes chapters on the subject matter of copyright, moral and economic rights, the requirement of permanent form, originality, the qualifications of the author and connecting factors, term of copyright, authorship and ownership, infringement, defences to infringement, assignment and licensing and remedies and procedures.
The appendices of the text reproduce the complete text of an English translation of the Chinese Copyright Law as well as the major points and principles of the law and of Chinese Civil Law in general. The appendices also include the 1971 text of the Berne Convention, the Implementing Regulations of the Chinese Copyright Law together with the Regulations for the Protection of Computer Software and a case table.

As global communications continue to improve and expand, copyright will become increasingly important for all nations. Copyright Law in China provides an excellent foundation for understanding the Chinese treatment of copyright law and will provide insights for those whose copyrights may be exploited in China.

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By PATRICK BOYER.

Reviewed by Gregory Tardi*

What turns someone whom the Financial Post once described as "a decent, competent, quiet Toronto lawyer who made an excellent Sunday school teacher", 1 into a jurist of uncommon distinction with a lasting influence on the legal system of his country? This is the question addressed by Patrick Boyer in his masterly biography of James McRuer, the long-serving Chief Justice of the High Court of Ontario and first Chairman of the Ontario Law Reform Commission.

The interest of this book is that it is far more than a recital of the numerous positions held by McRuer, or a listing of his considerable accomplishments. The author investigates the sources of McRuer’s views of the law, of society and of life: family origins, class, relation to the land, ardent political opinions and, in particular, McRuer’s deep religious conviction. He also examines how these origins combined with the evolving influences in McRuer’s life in forming the lawyer, the judge and eventually the law reformer.

The most significant motivation in McRuer’s career is described as his outrage at injustice. This sentiment led him to conceive of the law not only as set of rules for civil society, but as an expression of personal and collective ethics. Thus, whether representing private clients or the State, McRuer sought to use the law as a way to achieve progress on the vital social issues of the day. His focus was not merely on practising law, but on the use of the law to achieve

* Gregory Tardi, of the Québec Bar, Legal Counsel, Elections Canada.

1 Financial Post (20 February 1937); cited in Boyer at 117.
justice. In this context, one of the keys to McRuer’s success was that he combined his progressive outlook and high moral stance with great intelligence, general inquisitiveness and extraordinary dedication to the tasks at hand.

McRuer realized very early in his career the intimate link between the practices of law and politics. His ability as a lawyer and his connections with like-minded figures in public life involved him, at first, in the federal prosecution of stock fraud schemes, in combines investigations, as well as in some notorious criminal trials. The reputation earned from this work brought him into contact with many luminaries of his day. It was through his cooperation with Agnes McPhail, the first woman elected to the House of Commons, that McRuer came to espouse the course of prison reform. This in turn, along with his ties to Prime Minister Mackenzie King, led to his first major appointment, as a member of the 1936 Archambault Royal Commission on the Penal System.

The record of McRuer’s years on the bench, from 1944 to 1964, is neatly set out in this book through a chapter on judicial life, followed by others grouping his most notable cases, on various issues of public and criminal law, the environment and native people, and women, children and workers. In an era when scholarly authors are becoming increasingly interested in the relationship between the philosophical outlook of judges and the outcome of cases they consider, the story of this phase of McRuer’s professional life is particularly stimulating. In many instances, McRuer was called on to make law so as to integrate political, social, economic, as well as other public policy considerations, while satisfying the requirements of statute and meeting the standards of his world-view. The intricacies and difficulties of this judicial balancing act provide reading that is as riveting for the practitioner as it is of interest for those involved in the substantive topics of the cases.

A great deal of the fascination of these chapters arises from the permanence of the issues of public debate. The right of women to equality in marriage, the liability of polluters, the use of the insanity defence, the utility of the death penalty and the media coverage of trials, for example, are issues of public concern as vital today as they were in the post-war years. McRuer thrived on deliberating such cases, even preferring his position on the High Court where he could deal with the human side of each case, seeing the litigants before him, to a seat on the Court of Appeal.

The high point of McRuer’s career was his conduct of the inquiry into civil rights from 1964 to 1971 and his leading role on the Ontario Law Reform Commission from 1964 to 1977. It is also the portion of the book relating to this period that is most compelling and pertinent to the current state of Canada’s legal system. The significance of McRuer’s contribution to our understanding of civil rights, as society’s collective struggle against injustice, is acknowledged.

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By demonstrating the need for law to keep pace with the evolution of civil society, Boyer underlines the pressing need for a permanent institution to take stock of the legal system and where required, to update it and modernize it within the interdisciplinary milieu of the State apparatus. While the work of the OLRC dealt of course exclusively with provincial areas of jurisdiction, the comparisons drawn between it and the Law Reform Commission of Canada are not only telling, but also most timely. The Ontario Commission dealt with many issues of black letter law, but also with the legal aspects of provincial institutions. Its deliberations were rigorous and comprehensive, reflecting McRuer’s style. Its work incorporated expertise from related disciplines. Its reports thus provided high quality input into the legislative agenda of Queen’s Park. The OLRC developed into a trusted source of independent, non-partisan, legal advice, not for the government but for the legislature. It may now be appropriate to examine whether such a scheme could again be adapted to the federal level.

Patrick Boyer’s work is thoroughly researched and informative. While the author is an obvious admirer of McRuer, his treatment of McRuer is entirely balanced. For those interested in understanding how a life in the law is moulded, this book is most enjoyable reading.

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Privacy and Free Enterprise — The Legal Protection of Personal Information in the Private Sector.

By IAN LAWSON.

Compte rendu de René Laperrière*

Voici une volumineuse étude qui intéressera tous ceux et celles qui se préoccupent d’un des aspects les plus importants des droits de la personnalité: celui de la protection de la vie privée. Celle-ci est surtout connue sur le plan juridique par les diverses législations qui ont été adoptées depuis les années 1970 pour la mettre en oeuvre. Certaines provinces canadiennes de common law se sont préoccupées d’élaborer des Privacy Acts et des lois plus spécialisées de protection des renseignements personnels, ces dernières ne s’adressant toutefois qu’aux secteurs publics et parapublics, à l’instar de la Loi sur la protection des renseignements personnels adoptée par le Parlement canadien en 1982. En outre, les tribunaux se sont fondés notamment sur l’article 8 de la Charte canadienne des droits et libertés pour en tirer un droit limité à la protection de la vie privée, qui peut aussi compter sur certaines dispositions du Code criminel, des lois de protection de la propriété intellectuelle, et de certaines lois spécialisées comme la Loi sur les banques.

* René Laperrière, Département des sciences juridiques, Université du Québec à Montréal, Montréal, Québec.
Cependant, au-delà de ces protections somme toute limitées, divers recours de common law peuvent être mis à contribution. La volumineuse étude d’Ian Lawson, pour le Public Interest Advocacy Centre d’Ottawa, a pour objet principal d’expliquer cette situation juridique complexe et de mettre en valeur les acquis et les possibilités de la common law canadienne. Elle dresse d’abord un portrait saisissant des nouvelles dimensions des atteintes à la vie privée, notamment par l’usage des technologies de l’information dans d’innombrables activités du secteur privé: l’information personnelle est devenue une marchandise qui s’échange sur divers marchés lucratifs, et une véritable industrie du renseignement s’est constituée à partir des violations de la vie privée des personnes fichées.

Face à ces développements qui nous mènent à grands pas vers une société de surveillance, le droit est resté relativement timide pour contrôler les activités du secteur privé. La recherche d’une définition du droit fondamental à la vie privée s’est avérée laborieuse, en raison de la généralité même du concept et des variations incessantes des moyens d’atteinte. Deux aspects principaux s’en dégagent: le droit de toute personne de ne pas être soumise à une ingérence dans ses affaires personnelles, et celui de contrôler l’information qui la concerne.

La common law canadienne, contrairement à l’américaine, tarde cependant à reconnaître pleinement un droit d’action autonome en matière de protection de la vie privée, particulièrement à l’encontre des violations perpétrées par les entreprises privées. Après avoir effectué sur cinq chapitres entiers une étude très fouillée des causes d’action, des défenses et des remèdes en common law, l’auteur constate que les solutions de common law restent partielles, circonstancielles, incertaines, probablement en raison de l’existence préalable d’autres recours qui peuvent servir au même usage; la doctrine et la jurisprudence canadiennes restent encore divisées sur l’opportunité de créer ou de reconnaître un tort spécifique d’atteinte à la vie privée. Quelques possibilités d’action s’ajoutent à partir de l’equity et des contrats. Quant aux remèdes disponibles, l’auteur déplore qu’il soit difficile au Canada d’obtenir des dommages «aggravés» et exemplaires pour atteintes à la dignité et à la réputation.

Le bilan des recours en common law et en equity qu’effectue l’auteur constitue un tour de force, et d’une certaine manière un véritable cours de droit approfondi destiné à faire autorité en la matière et dont tout plaideur en privacy devrait prendre connaissance. Non content de cette description critique, l’auteur a voulu considérer les stratégies propres à développer le secteur névralgique et négligé du «droit de l’information», à partir de l’idée que le droit devrait être formulé indépendamment des technologies existantes qui le rendent rapidement désuet. Il serait tout aussi dangereux de tenter une définition législative de la vie privée, en raison de son caractère évolutif: l’approche de common law, cherchant à redresser les torts, est difficile à appliquer à un concept aussi large que celui de la vie privée, dont on pourrait considérer la constitutionnalisation à titre de droit fondamental de la personne. Cependant, on pourrait mieux exploiter certaines causes d’action déjà disponibles, tels la négligence et lebris de contrat.
L'auteur préconise aussi un contrôle public par voie législative pour remplacer l'autoréglementation volontaire, de façon d’autant plus urgente que le Canada accuse un retard important sur le plan du droit international qui se développe et influence déjà le commerce des données: à cet égard, l’adoption toute récente de la directive européenne en la matière lui donne entièrement raison. Il examine les recommandations de législation sectorielle ou à la pièce qui ont été formulées au cours des ans et suivies dans certains cas, et plaide pour l’adoption de modifications législatives à la common law, particulièrement pour établir des actions autonomes en violation de la confidentialité et en violation de la vie privée, et pour faciliter l’octroi de dommages intangibles ou moraux qui restent nettement insuffisants.

Sans vouloir diminuer la qualité et le mérite de cette étude fort impressionnante et éminemment utile aux praticiens du droit à la vie privée, nous nous permettrons de formuler quelques critiques sous trois chefs. D’un point de vue civiliste d’abord, la lecture de cet ouvrage, présenté comme s’adressant au Canada tout entier, laisse l’impression que le droit civil du Québec ne serait pour l’auteur, en raison de sa codification, qu’un exemple parmi d’autres de statute law provincial venant modifier la common law généralement applicable.1 Pourtant, l’auteur ne manque pas de références intéressantes sur la législation et la doctrine québécoises, dont il cite quelques éléments; mais ceux-ci restent très partiels et rendent une image déformée de la réalité visée.2 Les lecteurs se consoleront cependant de cette insensibilité au caractère distinctif du système juridique québécois en remarquant l’attrait pour l’auteur de l’approche romano-civiliste dans la formulation de principes généraux et dans la pleine reconnaissance des droits de la personnalité, et en constatant que le Québec se situe désormais à l’avant-garde du droit nord-américain de protection des renseignements personnels.3

1 Ainsi à la p. 244, dans son examen de la diffamation en common law, l’auteur examine la décision Cossette c. Dun (1890), 18 R.C.S. 222 pour souligner que le juge en chef Ritchie, en se fondant sur l’article 1053 du Code civil du Bas-Canada, pouvait se dispenser de recourir aux principes généraux de common law ou de droit britannique... Dans la même veine, l’auteur cite à la p. 219, à propos d’inducement of breach of contrat, le projet avorté du bureau de crédit Equifax Canada auprès du Mouvement Desjardins au Québec, comme si la common law pouvait y trouver application.


3 Rappelons ici qu’au Québec le droit au respect de la vie privée occupe désormais une place de premier choix dans le Code civil du Québec, L.Q. 1991, c. 64, qui l’inclut à son article 3 dans ses énoncés de grands principes, puis en fait l’objet d’un chapitre particulier aux articles 35 à 41. Mais il avait été déjà consacré comme droit fondamental par l’adoption...
D’un point de vue social ensuite, on peut douter de l’efficacité de l’approche judiciaire prônée par l’auteur, soit pour l’usage amélioré des actions de common law, soit pour la création de recours devant les tribunaux en vertu de lois particulières. Malheureusement, l’accessibilité à ce type de justice pose encore un grave problème à la majorité de la population.4

Enfin, d’un point de vue internationaliste, la discussion de l’auteur sur l’autoréglementation ou le volontarisme normatif du secteur privé, qu’il trouve à bon droit insuffisante comme solution, aurait eu intérêt à s’inspirer des études de suivi effectuées à l’OCDE, organisme international à l’origine de la diffusion de cette notion dans ses Lignes directrices.5 À ce propos, il faut signaler pour le bénéfice des lecteurs, puisqu’il s’agit de développements contemporains, une nette évolution de pensée du Commissaire fédéral6 sur ce sujet depuis 1990, et les initiatives en ce sens visant à l’adoption d’une norme de protection de la vie privée par l’Association canadienne de normalisation.7

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4 Notons à cet égard que l’ensemble de la jurisprudence canadienne citée par l’auteur en matière de protection de la vie privée n’atteint pas encore le volume de décisions émises en la matière par la seule Commission québécoise d’accès à l’information depuis une dizaine d’années.


Sexual Offences Against Children and the Criminal Process.


Reviewed by Patricia A. Rowbotham*

I read this book from three perspectives: as an academic, as a lawyer and as a parent. From none of these perspectives was I disappointed.

The book is divided into four parts: the investigation, preparing a child witness to testify, the trial itself and post-trial issues. As such, it is intended to guide those persons involved in the criminal process through the various steps in a case involving child victims of sexual offences. It also provides general information on the types of alleged offenders, the psychological and psychiatric assessment of the alleged offenders and their possible treatment.

I believe that the background of the authors is as prosecuting counsel and that bias is apparent in the book. In fact, in the Preface they admit a bias towards courts being forums "for communication without gestures of oppression". Despite this bias in what is a difficult and emotional area of the law, the authors have also made this a very useful book for those conducting the defence in cases of child sexual assault. In guiding practitioners through the difficulties of investigating these crimes and of preparing the child to give evidence, the book also demonstrates the potential weaknesses in the Crown’s case.

The first part of the book, “The Investigation” contains a chapter on interviewing the child witness which is a must for police investigations. As police departments across Canada continue to develop guidelines in this area, they would be wise to consult this book. As a reader I was struck by many of the common sense suggestions applicable to any child. For example, is it nap time? Is the child hungry? How does this child’s stage of development affect his or her ability to understand the questions and respond appropriately? The chapter also goes further and addresses problems more specific to the child victim of sexual abuse. This is followed by a chapter on assessing the child’s credibility which considers many of the stereotypical concerns with the credibility of children.

In the second part of the book, “Preparing a Child Witness to Testify” the authors provide a sample structure for preparation of a witness in eight sessions, including suggested charts and workbooks for recording evidence of both child witnesses and adult survivors. There are sample preparation questions in order for the child to meet the requirements of section 16 of the Canada Evidence Act in language which children can understand. The authors have taken great care to consult with psychologists and other professionals and this is perhaps most apparent in the chapter dealing with preparation to testify about sexual acts. The book contains a list of seventeen common fears about testifying in court with

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*Patricia A. Rowbotham, of the Faculty of Law, University of Calgary, Calgary, Alberta.
useful suggestions on how to address these fears before trial and in the courtroom.

Part three, "The Trial" begins with a discussion of pre-trial considerations including Crown disclosure and some recurrent themes in this type of litigation such as delayed reporting. This is followed by four chapters discussing procedures and practices to protect the child, the law relative to the child witness, evidence concerning the credibility of the child, and the child’s testimony. The law is current to October, 1993 and, as such, includes the major amendments to the Canada Evidence Act regarding child witnesses, the amendments to the Criminal Code permitting videotaped evidence and the use of screens, and the major common law developments regarding hearsay R. v. Khan1 and the credibility of child witnesses R. v. W.(R).2 The authors have included many helpful case references to unreported decisions, particularly in British Columbia. It is often difficult to keep up with these decisions because many decisions regarding evidence occur during a jury trial where there may be no report of the ultimate decision. The authors are to be commended for their diligence in finding these decisions and including them in an organized manner. However, there does appear to be some confusion at page 165 of the book regarding the Supreme Court of Canada’s decision in R. v. B.(K.G.),3 addressing prior inconsistent videotaped statements as an exception to the rule against hearsay, and an unreported Alberta Court of Queen’s Bench decision, R. v. B.(K.),4 dealing with the use of videotaped evidence of a complainant pursuant to section 715.1 of the Criminal Code. Part Three concludes with a chapter on expert witnesses, including medical and psychological evidence and some of the problems associated with the use of experts at trial.

The final part entitled "When Guilt is Established" contains a discussion of the psychological and psychiatric assessment of the offender and a chapter devoted to treatment and sentencing. These chapters provide a general overview rather than any in-depth discussion of these concepts. Readers particularly interested in the area of assessment of the offender would probably wish to consult medical or psychology journals, and indeed the authors provide some valuable references to such works.

My one criticism of this book is in its treatment of adult survivors of child sexual abuse. Its discussion of issues involving adult witnesses lacks the depth which the book has devoted to child witnesses. For example, the issue of "recovered memory", a major concern in many cases involving adult survivors, is treated in a very cursory manner in a chapter entitled, “Special Circumstances.” The book also contains a very brief discussion of civil compensation with reference to three British Columbia cases, while there are literally dozens of cases in the area of tort law that address many of the issues involved in civil

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litigation of these types of claims. A reader interested in problems particular to adult survivors of child sexual abuse would not find the book helpful.

In conclusion, this is an excellent reference book for anyone involved in criminal trials alleging sexual offences against children. One of the very sad legacies of the latter part of the twentieth century is the overwhelming number of cases involving sexual abuse. Accordingly, our criminal justice system has been faced with many novel issues in dealing with these allegations. One of the most difficult challenges has been to alter outdated views of the credibility of children. The adversarial system and the search for truth through cross-examination are often ill-suited to trials involving children. The authors are to be commended for taking on this subject and using their expertise to assist in making the experience less threatening for children exposed to our criminal justice system.

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Civil Action for Childhood Sexual Abuse.


Reviewed by Elizabeth Sheehy*

This text focuses on the use of the tort action on behalf of women who experienced sexual abuse of children, which is a growing and significant area of tort law. Civil Action for Childhood Sexual Abuse is presumably aimed at the practitioner, for it takes a pragmatic approach to the preparation and presentation of claims for childhood sexual abuse. The strengths of this text are its review of the social science literature on sexual abuse and its focus on one barrier, that of the limitation period, to tort claims for this wrong. The weaknesses of this text suggest that it should be treated as an introduction only to the subject: lawyers conducting such litigation will require additional research to review the Canadian case law on both the substantive issues and the issue of compensatory damages for sexual abuse. Lawyers would also be advised to delve into the considerable feminist literature on tort claims for sexual abuse in order to fully consider the client's options and to properly advise.

Part I of this text, "The Psychology of Abuse", presents a useful synthesis of social science literature regarding the effects of abuse on children in the short term and the long term, including some of the key concepts in the debate over "false memory syndrome", the behaviours of perpetrators, and the role of the

* Elizabeth Sheehy, of the Faculty of Law, University of Ottawa, Ottawa, Ontario.
non-intervening or non-offending parent. While this part is neither exhaustive nor current in that this literature is changing rapidly, it provides a good entry point for lawyers who need an information base from which to comprehend their clients’ experience, to anticipate responses such as possible recantation by the client of her allegation, and to communicate to others in the legal process the nature of her injury.

Part II of the text describes the law relevant to the wrong of sexual abuse by focussing on overcoming the hurdle of limitation periods that have expired before a client has come to awareness of both the wrong and its impact upon her life. The authors use the Supreme Court cases of M.(K.) v. M.(H.),¹ which originated in Ontario, and Norberg v. Wynrib² to demonstrate the different ways in which the legal wrong can be characterized, including breach of fiduciary obligation, and how specific legal doctrines such as “fraudulent concealment” can be used, along with social science research, to argue that women’s claims should not be barred by statutory limitation periods. The authors engage in a painstaking analysis of the statutes of limitations in all of the provinces and territories, examining the precedents in these jurisdictions and illustrating the application of creative arguments on behalf of survivors of sexual abuse to each statute. When read with the Appendices that provide sample pleadings, this segment should prove valuable to litigation lawyers.

The authors sustain this analysis of overcoming limitation periods by applying it as well to the law of England, the United States, Scotland, Ireland, Australia and New Zealand. Although these particular chapters in Part II may be useful to lawyers in these jurisdictions, they are unlikely to assist Canadian lawyers because, with the exception of some decisions from the United States, these jurisdictions trail the Canadian courts in terms of creative doctrines for survivors. These chapters comprise approximately 125 pages, and thus effectively displace other materials that would be extremely useful for Canadian lawyers, such as a review of the cases themselves (and there are many)³ and discussion of the other substantive hurdles faced by litigants, including the “consent” defence.

Part II ends with a chapter on the use of expert evidence and a chapter discussing the possibility of a defamation action against the woman alleging sexual abuse. This latter chapter is an extremely important inclusion in this text, for it alerts lawyers to a risk of retaliation that clients must consider in deciding whether to pursue a tort claim. This chapter also constitutes a rare and specifically Canadian analysis of the legal defences available to women who are sued for defamation arising out of the pursuit of a tort claim for sexual abuse.

Part III, which covers damages, is structured in a similar fashion to Part II: it commences with a review of the relevant Canadian law on damages for sexual abuse and then proceeds to apply the same analysis to the law of damages for England, the United States, Scotland, Ireland, Australia and New Zealand. By opting for broad comparative coverage, the authors have again sacrificed significant issues of substance. This part is focused solely on the issues of the availability of exemplary and aggravated damages, with no attention being given to the details of compensatory damages and the complexities of claims for losses such as therapy costs and lost income. This focus is questionable not only because lawyers will need to consult other works for the damages analysis, but also because the authors' own conclusion in the last chapter in this part (at 312) is that rarely will exemplary damages be recoverable under the perpetrator's insurance policy, thus making many such awards symbolic only.

Finally, a remaining difficulty with this text is its failure to incorporate the feminist legal literature on the subject of sexual abuse and the use of a tort remedy. While the authors use sex-specific language throughout their text to designate victims and perpetrators, acknowledging (at 4, footnote 4) the gendered nature of sexual abuse, they have not explored this insight through the relevant feminist literature. The feminist work nuances some of the rather blunt conclusions offered by Civil Action for Childhood Sexual Abuse, and would also provide additional information to clients and arguments for counsel at trial.

For example, Part I effectively obscures the issues surrounding the responsibility of mothers who fail to protect their children from sexually abusive men by noting the possibility of violence against such mothers under the sub-heading of "collusion" (at 41) and by presenting contradictory statistics regarding the incidence of maternal collusion (at 38-39). This initial obfuscation permits the authors to advocate suits against non-intervening mothers and to render a simplistic account of the law regarding liability. More generally, the feminist legal literature is important in that it compares the tort remedy to other legal actions such as criminal prosecution and criminal injuries compensation, thus providing potential clients with critical information for their decisions. This literature also contains thorough

4 For such analyses see B. Feldthusen, "Discriminatory Damage Quantification in Civil Actions For Sexual Battery" (1994) 44 U.T.L.J. 133; K. Sutherland, "Measuring Pain: Quantifying Damages in Civil Suits for Sexual Assault" in K. Cooper-Stephenson and E. Gibson, eds., Tort Theory (North York: Captus Press. 1993) at 212; and Sheehy, supra footnote 3.


6 Although the authors do compare criminal and civil proceedings and make reference to the possibility of criminal injuries compensation, the discussion is a cursory three pages. Compare N. West, "Rape in the Criminal Law and the Victim's Tort Alternative: A Feminist Analysis" (1992) 50 U. T. Fac. L.Rev. 96 and Sheehy, supra footnote 3.
analyses of the cases to date, identifies aspects of discrimination in the tort remedy, and proposes arguments for lawyers to advance on behalf of women who sue for sexual abuse.\footnote{See the articles discussed \textit{supra} footnotes 3-6, as well as N. Des Rosiers, "Childhood Sexual Assault — Will There Be a Meaningful Civil Remedy?" (1992) 10 C.C.L.T. (2d) 86 and "Limitation Periods and Civil Remedies for Childhood Sexual Abuse" (1992) 9 Can. J. Fam. L. 43.}

In sum, \textit{Civil Action for Childhood Sexual Abuse} will be of great assistance to lawyers in Canada and other countries who confront the specific obstacle of restrictive statutes of limitations as they affect tort claims for sexual abuse. However, with respect to the issues of substance in such claims and other concerns for the client, including the question of compensatory damages, answers must be sought elsewhere than this book.